RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

WILLIAM M. FISHER *v.* HORACE TIFFT.

If an outgoing partner takes a bond of indemnity from the remaining partner, against all the liabilities of the firm, and the obligor obtains a discharge in bankruptcy, and subsequently, the obligee is compelled to pay the partnership debts, the discharge in bankruptcy is a bar to a suit on such bond of indemnity.

THIS was an action of debt on a bond, the condition of which was as follows, to wit: "The condition of this bond is such that if the said obligors shall well and truly pay, and cause to be paid, all the debts and liabilities of the late firm of H. Tifft & Co., in which said Fisher (the plaintiff) was a partner, and save the said Fisher from loss by reason thereof, this bond to be void, otherwise of full force and virtue." The bond was dated October 6th 1858, and was executed on that day by the defendant, and also by Milton W. Blackinton and J. E. Brewster.

It appeared in testimony submitted to the court, jury trial having been waived, that previous to October 6th 1858, the plaintiff and defendant, together with Blackinton, were engaged in business as co-partners, under the firm of H. Tifft & Co., and that the plaintiff had sold out his interest in the firm to Brewster, and that thereupon the defendant Blackinton and Brewster formed a new co-partnership, and having agreed with the plaintiff to assume the debts and liabilities of the old co-partnership, gave him the bond aforesaid for his indemnity. It also appeared that December 21st 1861, one Josiah D. Richards recovered judgment for $1964.42 against the members of the old firm, including the plaintiff, upon a claim which he held against the old firm, and that June 1st 1868, the sum of $673.33 still remaining due on said judgment, the plaintiff was compelled to pay to said Richards, in order to obtain his release from said judgment, the sum of at least $233.72. He claimed that he was compelled, also, to pay for his release the further sum of $370.16, making in all the sum of $603.91, which, with interest thereon, he sought to recover in this action.

The defendant set up in bar of the action his discharge in bankruptcy, under the laws of the United States, which was granted to him May 11th 1868, and which discharged him from all debts and claims, which were made provable by the law against his estate, and which existed on the first day of August 1867, the day on which

his petition in bankruptcy was filed. The plaintiff contended that this claim in suit did not exist, and was not provable before his payment on the Richards judgment, which was not made until after the discharge was granted, and that, therefore, the discharge was not a bar to his action. He conceded that if the claim was provable the action was barred.

Thurston, Ripley & Co., for plaintiff.

Samuel Currey, for defendant.

The opinion of the court was delivered by

DURFEE, C. J.—The Bankrupt Act, Revised Statutes of the United States, § 5068, provides that "in all cases of contingent debts and contingent liabilities, contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed," &c. The act also provides, § 5070, that "any person liable as bail, surety, guarantor, *or otherwise*, for the bankrupt," whether he has paid the debt or not, may prove the debt if the creditor omits to prove it. The language of these provisions applies broadly to contingent and uncertain claims and liabilities. Is it not broad enough to cover the claim in suit?

The defendant relies upon § 5068, and unless the claim in suit is otherwise provided for in the act, the section seems to be broad enough to cover it. Certainly the bond creates, if not a contingent debt, at least a contingent liability, and such a liability is within § 5068. The present Bankrupt Act is in this respect, as is remarked in *Jones* v. *Knox*, 46 Ala. 53, also in 8 Bankrupt Register 559, broader in its application to contingent claims than the Bankrupt Act of 1841, and consequently the decisions, under the Act of 1841, which are relied on by the plaintiff, are not fully in point. The Act of 1841 was more like the English Bankrupt Act, which extended to *debts* payable on a contingency or to contingent debts; but did not extend to a mere contingent liability. *Hankin* v. *Bennett*, 8 Exch. Rep. 107; *French* v. *Morse*, 2 Gray 111; *Riggin* v. *Magwire*, 15 Wall. 529. The plaintiff contends that the claim was not provable, because incapable of proof. We think, however, it was capable of an approximate proof, which is all that can ever be made in cases of contingent liability. When the defendant filed his petition in bankruptcy, the balance due on the judgment had been due for several years, and there could be little reason to doubt that the plaintiff, if he had the means, would be

called upon for payment. And see *Jones* v. *Knox*, cited above, and *Jones* v. *The State*, 28 Ark. 119.

It may be questioned, however, whether the claim in suit is not "provided for" by § 5070, rather than by § 5068. The provision contained in § 5070 is somewhat similar to a provision of the English Bankrupt Act, which extends to sureties and persons "liable for any debt of the bankrupt." The provision of the English Bankrupt Act came up for construction in *Wood* v. *Dodgson*, 2 M. & S. 195. There, on the dissolution of a firm, consisting of three partners, two of them assigned their interest in the joint effects to the third, and took from him a covenant to pay the debts and indemnify them. The third partner, however, became a certificated bankrupt, and afterwards, the other two partners were obliged to pay a debt of the firm. An action subsequently brought on the covenant, was held to be barred by the discharge in bankruptcy, upon the ground that under the covenant the covenantor became in equity, as between the partners, the principal debtor, and the other two his sureties, and that, as sureties or *persons liable* for the debt of the bankrupt, they were subject to the provision aforesaid. And the same view was taken by the Supreme Court and Court of Appeals of New York, under the Act of 1841, in *Crafts* v. *Mott*, 5 Barb. S. C. 305; 4 N. Y. 603. There the plaintiff and defendant gave their bond on a joint purchase of land. The plaintiff afterwards conveyed to the defendant, who thereupon agreed to pay the bond and indemnify him. Subsequently the defendant was discharged as a bankrupt; and after that instalments fell due on the bond which the plaintiff was obliged to pay. It was held that the plaintiff was to be regarded as standing in the relation of surety for the defendant, and therefore that his right to recover for the instalments so paid was barred by the discharge. See also *Mace* v. *Wells*, 7 How. U. S. 272; *Butcher* v. *Forman*, 6 Hill 583.

These cases seem to show that the claim in suit is to be regarded as provided for by § 5070; but whether provided for by § 5070, or provable under § 5068, in either case any action thereon is barred by the discharge. We think it was either provided for by § 5070 or provable under § 5068, and therefore give the defendant judgment for his costs.

Notwithstanding the great respect to which the decisions of the Supreme Court of Rhode Island are justly entitled, there is some room for differ-

ence of opinion as to the point involved in this case. Of course, all agree that the claim here sued upon was barred by the discharge in bankruptcy, if the same was provable, otherwise not. It is equally clear that if provable at all, it must have been either under § 5068, as a "contingent liability," or under § 5070, as a payment by one "liable as bail, surety, guarantor or otherwise for the bankrupt." To consider the last ground first. Is an outgoing partner, who still remains bound to the original partnership creditor, and on the original partnership debt, liable as surety or guarantor for his remaining partner, merely because the latter has, as between themselves, agreed to pay the whole debt, and to indemnify the other from his liability, the creditor having done nothing to release him from his original and primary obligation? That he is still an original debtor and not a surety, so far as the *creditor* is concerned, is of course admitted. If sued by him, he must be sued as a co-debtor, and not as surety or guarantor. As to him, he is still originally and not collaterally liable. He would not be discharged or released by any extension or indulgence as to payment by the creditor to the remaining partner, as a surety or guarantor might be. Would he be at the same time principal debtor to his creditor, and surety only as between himself and his partner, without some *express* agreement or understanding to that effect? The argument is, that because the remaining partner ought equitably to pay the whole debt, the retiring partner stands to him *in the light of* a surety merely, in equity at least, and therefore should be so considered, in a suit at law, by him against the other, for contribution or remuneration. It is true doubtless that in equity he may for some purposes be considered to stand in the same situation as a surety, strictly so called. For this reason, he would be entitled, in a court of equity, if he was called upon to pay the whole debt, to be subrogated to the rights of the creditor as to any collaterals or security he might hold against the remaining partner alone, for the same debt, and so might enforce them in equity in the name of the creditor against his former partner. See *Butler* v. *Birkey*, 13 Ohio St. 515; *The Ætna Ins. Co.* v. *Wires*, 28 Vt. 93; *McCormick* v. *Irwin*, 35 Penna. St. 111; *Frood, Jacobs & Co.'s Estate*, 73 Id. 459. But this is allowed only in equity, and because it is for *his advantage* and protection, and in order to compel the real debtor to pay the debt himself. But does the same rule apply *at law* in a suit by him to recover remuneration, when the effect of it would be exactly the reverse, viz., to deprive him of a remedy, and release the true debtor from paying any one? Does the maxim, *cessante ratione, cessat ipsa lex*, apply? That is the question involved in *Fisher* v. *Tifft*.

The English courts put a strict construction upon the words "surety or other person liable for the bankrupt," and refuse to extend the term so as to include those who might equitably be considered a surety or person liable for the bankrupt, such as to bail, who became such before the bankruptcy, but who were not called upon to pay until after. These were not allowed to prove under the Bankrupt Act of 49 Geo. 3, c. 121, s. 8, as a surety or person liable for the bankrupt, and it required additional legislation to include their case by express words. See *Newington* v. *Keeys*, 4 B. & Ald. 493 (1821); *Hewes* v. *Mott*, 6 Taunt. 329, 2 Marsh. 192 (1815). And see *Goddard* v. *Vanderheyden*, 3 Wils. 262 (1771). But the bail of a bankrupt, who pays money solely for his benefit, has certainly as good a right to indemnity, and share in the assets of the bankrupt, and to be considered as an equitable surety for him, as a copartner has, who in paying

his money only pays his own debt, and for which he had received the original consideration.

In *Hoare* v. *White*, 3 Jur. (N. S.) 445, 40 Eng. Law & Eq. 366 (1857), the plaintiff was under-tenant to the defendant, and the defendant had agreed to indemnify him against paying rent to the head landlord, and then went into bankruptcy, and the tenant was compelled to pay the whole rent. After the defendant's discharge, he sued him for the same, and it was claimed that the plaintiff was "a person surety or liable for the debt of the bankrupt," and might have proved his claim in bankruptcy, and therefore it was now discharged. The term surety in the bankrupt laws, it was said, has had the widest extension, and *Wood* v. *Dodgson*, 2 M. & S. 195, and *Vansandan* v. *Corsbie*, 3 B. & Ad. 13, were cited; but the whole Court of Exchequer, without even calling upon the other side, said there must be judgment for the plaintiff.

So, where the plaintiff was the acceptor of a bill of exchange, which the defendant, for good consideration, subsequently agreed to pay, and indemnify the plaintiff therefrom, but went into bankruptcy, and the plaintiff was compelled to pay the bill, it was held he could not prove the same against the defendant on the ground of being a surety or other person liable for him: *Yallop* v. *Ebers*, 1 B. & Ad. 698 (1831).

So, one who draws a bill payable to his own order, and then endorses it for the accommodation of the next endorsee, is not a "surety or liable for the debt" of such endorsee, so that he could prove in bankruptcy against him: *Mayer* v. *Meakin*, Gow 183 (1820). But there does not seem to be entire consistency in the views of the English courts on this subject, since it has several times been held, that an accommodation endorser is a "person liable for the debt" of the maker so accommodated, and if the latter goes into bankruptcy, the former, having paid the debt, may prove against his estate, and so is barred by his discharge: *Bassett* v. *Dodgin*, 9 Bing. 652 (1833); *Vansandan* v. *Corsbie*, 3 B. & Ald. 13 (1819); *Stedman* v. *Martinnant*, 13 East 427 (1811); *Ex parte Lloyd*, 1 Rose 6; *Ex parte Yonge*, 3 Ves. & Beam. 40.

The Supreme Court of Massachusetts considered this very question of *Fisher* v. *Tifft*, in *Morton* v. *Richards*, 13 Gray 15 (1859), a case arising under the state insolvent law: st. 1838, c. 163, p. 3. That stat. allowed the proof of any sum paid "by any *surety* of the debtor in any contract, if the payment was made before the first dividend." The plaintiff had been in company with one Johnson, under the firm of Johnson & Morton. The latter sold out to one Daniels, and the new firm of Johnson & Daniels assumed all the liabilities of the old firm of Johnson & Morton, and agreed to indemnify Morton against his liability therefor. Johnson & Daniels then went into insolvency, and one of the old creditors compelled Morton to pay his whole debt, and Morton offered to prove the same against Johnson & Daniels before any dividend had been declared, on the ground that he had paid it as surety for them. But the full court refused to allow it, on the ground that he was not a surety, but a principal debtor, and in paying it he paid his own debt. A surety, said the court, is "he who becomes answerable, by contract with another, for the payment to him of a third person's debt, or for the performance of a third person's other undertaking or duty." This case seems to be in direct conflict with *Fisher* v. *Tifft*, above.

It is true, the U. S. Bankrupt Act uses the phrase "or otherwise liable for the bankrupt," but does not that mean otherwise *similarly* liable—*ejusdem generis?* The same general phrase was found in the English Bankrupt Act, but was held not to extend to all liabilities. The phrase is liable *for* the bankrupt.

One co-partner is liable *with* his partner, but not exactly for him. There seems to be as much reason for calling him a guarantor for his partner as for saying he is a surety. The familiar maxim of *noscitur a sociis* applies. General words are often restricted by prior specific words. Thus, the words "other person whatever" after "tradesman, artificer, workman, laborer or other person whatsoever," do not include every person—a stage-driver—but only persons *ejusdem generis: Sandiman* v. *Breach*, 9 B. & C. 96 (1827). Nor an attorney: *Peate* v. *Dicken*, I C., M. & R. 428 (1834). A statute which forbids "any artificer, calico printer, &c., &c., *or any other person*," from absenting himself from his employment, does not apply to a house-servant: *Kitchen* v. *Shaw*, 6 Ad. & El. 729 (1837). A statute which enacts that "no writ or process shall be sued out against any district surveyor *or other person* for anything done under the act, without a month's notice," does not apply to *every* other person, but only to persons *ejusdem generis* with district surveyors: *Williams* v. *Golding*, Law Rep. 1 C. P. 69 (1865).

A power to tax "auctioneers, grocers, merchants, &c., and all *other business*, trades, associations or professions whatever," does not include the business or profession of a lawyer: *City of St. Louis* v. *Laughlin*, 49 Mo. 559 (1872). A law prohibiting a person to navigate "any lighter, wherry *or other craft*," does not apply to one navigating a steam-tug of eighty-seven tons burden, but only to vessels of the same kind as lighters and wherries: *Reed* v. *Ingham*, 3 El. & Bl. 889 (1854). A statute, "that whenever the exigencies of any army in the field are such as to make impressment of forage, articles of subsistence *or other property*," absolutely necessary, it may be made, does not include all other property, but only similar to those specified in the act: *White* v. *Ivey*, 34 Geo. 199 (1865). A statute giving a board of officers power to remove "for incompetency, improper conduct or *other cause* satisfactory to the board," means only kindred causes: *State* v. *McGarry*, 21 Wis. 496 (1867). Analogy, therefore, would seem to sanction the conclusion that the words "otherwise liable for the bankrupt," should be confined to liabilities similar to those of sureties, guarantors, &c.

Thus far as to the argument upon the question; now as to the authorities cited by the learned court. Some of them do not apparently have a material bearing upon the exact point involved. The only point involved in *Jones* v. *The State*, 28 Ark. 119, was whether a surety on a bail-bond was released by his own discharge in bankruptcy, *as against the obligee in the bond*, a point too plain to question. Exactly similar was *Jones* v. *Knox*, 46 Ala. 53, a surety on a guardian's bond. No doubt the liability of a surety on a bond *to the creditor* is, as between *them*, a contingent liability, which may be proved against the estate of the surety in bankruptcy; but that is very far from this case. Here the question is not whether the obligee of a bond can prove against the estate of the surety thereon, but whether some other party can prove. The only point in *Mace* v. *Wells*, 7 How. 272, also relied upon by the court in *Fisher* v. *Tifft*, was whether one who was avowedly and expressly only a surety for another, could prove against the principal for a payment made by such surety after the bankruptcy, on a claim over-due before—a case clearly provided for by the express terms of the Bankrupt Act. It must be admitted, however, that the cases of *Wood* v. *Dodgson* and *Crafts* v. *Mott* support the view taken by the court. To these also might be added *Aflalo* v. *Fourdrinier*, 6 Bing. 306, 3 M. & P. 743 (1829); *Dean* v. *Speakman*, 7 Blackf. 317 (1844); *Frentress* v. *Markle*, 2 Iowa 553 (1850);

Clarke v. *Porter*, 25 Penna. St. 141 (1855), and perhaps others. But it may be noticed that in some of these cases the retiring partner had either paid the *whole* or more than his proportion of the joint debt, and therefore was equitably entitled to contribution from his partner, independent of any special bond of indemnity, which might give a stronger claim to prove, for the excess at least above his share, against the bankrupt partner; whereas, in *Fisher* v. *Tifft* the plaintiff had not paid even a third of the joint debt, and his claim for reimbursement rested solely upon his bond, and not upon any equitable rule of contribution. This very ground of distinction is relied upon in some of those cases.

In view of these conflicting decisions, it is obvious there is room for honest difference of opinion upon the provableness of this claim under the surety clause.

2. Can it be proved, under § 5068, as a "contingent debt or liability contracted by the bankrupt?" Was Tifft under a contingent liability to Fisher when he went into bankruptcy, Fisher not then having been called upon to pay anything on the joint debts? To determine that question, it is necessary to consider the distinction between a "contingent liability" and a "liability depending upon a contingency." The one is provable, the other not. The first is an existing demand, fixed, established, determined, but the cause of action upon which depends on some future contingency. The other is a liability, the very existence of which depends upon some future event. At present it is only inchoate, initiated, but not complete. Doubtless the word "liabilities" is broader than the word "debts," since it includes unliquidated claims, like policies of fire insurance, for instance, and is not confined to fixed and ascertained sums or debts; but the contingent element is the same in both. The same facts and circumstances which render a fixed "debt" not provable because of some contingent event, will have the same effect upon a contingent "liability." A promise to pay a certain fixed sum, if the promisor is ever able, is a contingent promise, and it may be proved in bankruptcy, although the contingency does not occur until after the petition is filed. The liability of an insurance company before a loss, is a contingent liability, and if the loss occurs before a final dividend, though after the company becomes bankrupt, it is provable against them: *In re the American Plate Glass Co.*, 12 Bank. Reg. 56, in which the distinction here stated is expressly recognised.

If a debtor makes his note to the creditor for part of the amount due, and deposits it with a third person, to be delivered to the creditor, if he will accept the same in full, and while it is in such third person's hands, the debtor goes into bankruptcy, he is at that moment contingently liable on the note, and if the creditor afterwards accepts it, he may prove it as an existing contingent liability at the date of the petition: *Spalding* v. *Dixon*, 21 Vt. 45 (1848).

The promise of an endorser is a contingent liability, certain in amount, but its enforcement, or cause of action thereon, is dependent upon the contingency of due demand and notice. Such a claim is therefore clearly provable against the endorser, although the contingency had not happened at the commencement of the proceedings. For the same reason the liability of a surety or guarantor may be proved against him, though the default of the principal does not occur until after the surety has gone into bankruptcy. All these are contingent liabilities, properly so called. But the liability of the principal *to reimburse his surety* is not a contingent liability, but a liability depending wholly upon a contingency, the con-

tingency of the surety paying the debt, and which may or may not happen, even though the principal has made default. No liability even exists until the surety has paid the claim; he has no cause of action until that time, and the Statute of Limitations begins to run only from that time. Consequently, if the surety has not paid the debt prior to the bankruptcy of the principal, he could not (except for the *express* provision in the Bankrupt Act allowing it) afterwards pay it and prove against the bankrupt. He could not do so under the mere "contingent liability" clause. There was no liability from the bankrupt to him *at the time of the bankruptcy*, but only a liability to a liability, an exposure to a liability, but no more. See *McMullen* v. *Bank of Penn Township*, 2 Penna. St. 343 (1845); *Cake* v. *Lewis*, 8 Id. 493 (1848), approved, though distinguished, in *Stone* v. *Miller*, 16 Id. 453 (1851); *Pike* v. *McDonald*, 32 Me. 418 (1851); *Leighton* v. *Alkins*, 35 Id. 118 (1853); *Wells* v. *Mace*, 17 Vt. 503; *Pogue* v. *Joyner*, 1 English 241. These cases may have erred in not applying the United States Bankrupt Act, to payments made by a surety *after* the bankruptcy of the principal, but they are cited here only to show that without an express provision of a statute, a surety could not prove under the mere contingent clause. It is like the liability of a co-surety to indemnify his co-surety. If one surety goes into bankruptcy and the other afterwards, but before the discharge, pays the whole debt, he cannot prove for contribution against the other under the "contingent liability" clause, for at the commencement of the proceedings it was a liability depending wholly upon a contingency. Such were the uniform decisions in England and America. See *Porter*, *Ex parte*, 2 Mont. & Ayr. 281 (1835); *Clements* v. *Langley*, 6 B. & Ad. 372, 2 Nev. & M. 269 (1839); *Wallis* v. *Swinburne*, 1 Exch. 203 (1847); *Dunn* v. *Sparks*, 1 Ind. 397 (1849), 7 Id. 499; *Dole* v. *Warren*, 32 Me. 94 (1850); *Swain* v. *Barber*, 29 Vt. 292 (1857); *Goss* v. *Gibson*, 8 Humph. 197 (1847); *Kerr* v. *Clark*, 11 Id. 77 (1850), and many others. *Tobias* v. *Rogers*, 13 N. Y. 59, is contra, but it seems to be quite out of the current. It required special provisions of law to allow such proof, which was first secured in England by the Bankrupt Law Consolidation Act of 1849. See *Adkins* v. *Farrington*, 5 H. & N. 586 (1860).

The distinction between contingent liabilities and liabilities depending upon a contingency, is illustrated by many analogies. Thus, a plaintiff in a suit at law is under a kind of liability to the defendant to pay him the costs, if he fails in the suit; but this is not a "contingent liability," but a liability depending upon a contingency, and therefore, if the defendant recovers judgment for costs after the plaintiff has filed his petition, though before his discharge, he cannot prove against his estate on the ground of an existing contingent liability at the date of the petition: *Wilkins* v. *Warren*, 27 Me. 438 (1847); *Oxlade* v. *North-Eastern Railway Co.*, 33 Law J. C. P. 171 (1864); *Dows* v. *Griswold*, 122 Mass. 440 (1877). So, a contract or bond by A. to indemnify B. against any costs he may be called upon to pay C., in a suit then pending between B. & C., is not a contingent debt of A. before the suit is determined, and if A. goes into bankruptcy before such termination of the suit, his discharge is not a bar to a subsequent suit on his bond, to recover the costs subsequently awarded to be paid by B. to C.: *Hankin* v. *Bennett*, 8 Exch. 107 (1852). It required special legislation to meet such a case, as is now done in England by the Act of 1869.

The liability of sureties on the bond of a public officer, cashier, treasurer,

&c., is a liability depending upon a contingency, and not a contingent liability; if, therefore, they go into bankruptcy before any breach of the bond, and such breach occurs before their discharge, it cannot be proved against their estate, and would not be barred by their discharge. *Woodward* v. *Herbert*, 24 Me. 362 (1844); *Dyer* v. *Cleaveland*, 18 Vt. 241 (1846); *Ellis* v. *Ham*, 28 Me. 385 (1848); *Loring* v. *Kendall*, 1 Gray 305 (1854); *Fowler* v. *Kendall*, 44 Me. 448 (1858). And even though one breach had occurred prior to the bankruptcy, the English courts (prior to the Act of 1861 allowing it) always held, that the bond could not be proved, since future breaches might also occur. *Marchman* v. *Brookes*, 2 H. & C. 908 (1864).

Why can not a claim for rent, under a lease for a quarter unexpired when the lessee goes into bankruptcy, be proved against a bankrupt as "a contingent demand," although he still remains in possession? Because, at the beginning of the bankruptcy, it was then uncertain whether the bankrupt would continue to occupy the entire quarter, and, if he did not, no claim for a quarter's rent could ever arise under the lease. It was a demand depending upon a contingency, and not a contingent demand. *Savory* v. *Stocking*, 4 Cush. 607 (1849); *Bosler* v. *Kuhn*, 8 W. & S. 183 (1844); *McDougal* v. *Paton*, 8 Taunt. 584 (1818); *Stinemets* v. *Ainslee*, 4 Denio 573 (1847); *Prentiss* v. *Kingsley*, 10 Penna. St. 120 (1848); *Lansing* v. *Prendergaet*, 9 Johns. 127 (1812). Such a course of decisions was overcome only by the express words of § 5071 of the Act of 1867, *Treadwell* v. *Marden*, 123 Mass. 390 (1877).

This distinction between a "contingent demand" and a "demand depending upon a contingency" has been fully recognised by the Supreme Court of the United States in *Reggin* v. *Maguire*, 15 Wall. 549 (1872). There, R. conveyed land to E. in fee, with a covenant, that he had an indefeasible estate in fee therein. In fact the wife of T., a former owner, who was still living, had an inchoate right of dower therein, not having signed her husband's deed thereof to R. Subsequently, R. obtained his discharge under the Act of 1841. Five years after T. died, and his widow set up her claim for dower in the premises, which the grantee of R. was obliged to pay, and brought suit against R. on his covenant in the deed. It was *held*, that the discharge was no bar; that the claim was not provable against R.'s estate, it not being certain that the covenant would ever give rise to an actual duty or liability, and the cases of *Jemison* v. *Blower*, 5 Barb. 686, and *Shelton* v. *Pease*, 10 Mo. 475, cited as sustaining an opposite doctrine, were wholly disregarded. See, also, *French* v. *Morse*, 2 Gray 111 (1854); *Bush* v. *Cooper*, 18 How. 82 (1855); *Bennett* v. *Bartlett*, 6 Cush. 225 (1850); *Reed* v. *Pierce*, 36 Me. 456 (1853); *Burruso* v. *Wilkinson*, 31 Miss. 537. From the well-settled doctrine that such proof could not be made as a contingent liability, it was found necessary to specially provide for it under the English Act of 1861, §153. *Ex parte Elwes*, 33 Law J. Bank. 23 (1864). So, in *Fisher* v. *Tifft*, the defendant had given the plaintiff a bond to indemnify him against any payments he should ever be called upon to make on the old partnership debts: that he ever would be called upon to pay any, and, if so, how much, was wholly contingent and uncertain; the *foundation* of the defendant's liability was laid, but "it might never give rise to an actual duty or liability." Thus, it appears, that the claim in this case could not have been proved under the Act of 1841.

Is there any material difference, in this respect, between the act of 1841, and that of 1867? In the former the language is "all persons *having uncertain or contingent demands*, against such bank-

rupt, may come in and prove such debts *and claims* under the act, and shall have a right, when these debts *or claims* become absolute, to have the same allowed them."

The language of the Act of 1867 is: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may claim therefor, and have his claim allowed, with a right to share in the dividends, if the contingency shall happen before the order for the final dividend, or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

Are the words "contingent debts and contingent liabilities" any freer from uncertainty and contingency (the only point now material) than the words "uncertain and contingent demand," or, as afterwards called, "such debts *and claims?*" The decisions, under the recent act, seem to agree with those under the former law.

A bond by a defendant in a suit to return to the plaintiff the property in controversy, if such shall be the final decision, is not a contingent liability, within the meaning of the act, and if he goes into bankruptcy, and obtains a discharge before the suit is decided, his discharge is no bar. It was a liability depending upon a contingency, and not an existing contingent liability. *United States* v. *Rob Roy*, 13 Bank. Reg. 235; 1 Woods 43 (1870).

A. deposits property on storage with B. for a reasonable compensation, but no time being fixed. After it remains a while A. obtains his discharge in bankruptcy, but the property still remains in B.'s possession. For the storage, which accrued after the bankruptcy, A.'s discharge is no bar. There was no existing contingent liability for future storage, when A. went into bankruptcy. It was contingent, and uncertain, whether there ever would be any more liability, but not a contingent debt or liability within the meaning of the act. *Robinson* v. *Pesant*, 53 N. Y. 419 (1873).

In a suit against M. the property of H. was attached, as M.'s H. gave a bond to dissolve the attachment, and J. became his surety thereon, and H. placed property in J.'s hands to secure him from liability as surety, and to hold the same until the litigation terminated. Before it terminated J. went into bankruptcy and received his discharge, still having the property in his possession. Subsequently the suit against M. was dismissed, and J, then refused to redeliver the property to H., and pleaded his discharge in bankruptcy. *Held*, no bar, because the very *existence* of the claim for a return of the property by J. was contingent upon an event which did not occur until after the discharge of the bankrupt. H. had no claim against J. until the question of J.'s liability on the bond as surety for H. had been determined. *Jacobson* v. *Horne*, 52 Miss. 185 (1876).

L. gave B. a continuing guaranty for goods to be supplied to K. to the amount of 200*l*., and then obtained his discharge in bankruptcy. B. continued to supply K. with goods after the bankruptcy. *Held*, that L. was liable, notwithstanding his discharge; that the guaranty was not a "contingent liability" under 12 & 13 Vict. c. 106, § 178 (1849). *Boyd* v. *Robins*, 5 C. B. N. S. 497 (1858), reversing s. c. in 4 Id. 749.

Notwithstanding the English statute has now become by repeated amendments much broader than ours in allowing claims "depending upon a contingency," yet they steadily refuse to allow bonds of indemnity to be proved against the bankrupt, where the breach did not occur until after the filing of his petition. See *Betterley* v. *Stainsby*, Law Rep. 2 C. P. 568 (1867); *Ex parte Wiseman*, Law Rep. 8 Ch. App. 35

(1871); *Kellock* v. *Enthoven*, Law Rep. 8 Q. B. 458; 9 Id. 241 (1871).

Especially is this the case where the contract of indemnity is a contract not to be performed once for all on the happening of a single contingency, but one which is liable to be broken repeatedly at different times, upon the happening of various contingencies, and where separate damages could be recovered for each breach: Law Rep. 8 Ch. App. 35; which is the precise case of *Fisher* v. *Tifft*.

And they give two very good reasons for it. The first is that in cases like *Fisher* v. *Tifft* there is a double contingency, first that the obligor or bankrupt does not pay the debt himself, and second that if he does not, the holder of the indemnity will be called upon to pay, or be able to pay if he is; and they say the bankrupt act did not intend to include contracts involving such double contingencies, but only one single contingency. This view was expressed in *Mitcalfe* v. *Hanson*, Law Rep. 1 H. L. 242 (1866).

The other is that the non-payment of his own debt by the bankrupt himself is not a *contingency* at all within the meaning of the statute; that the word as there used means something casual, fortuitous, not something depending upon the mere will or whim of the obligor. To make the act apply to such a case would make it within the power of a bankrupt to make a claim provable or not against him, according to his election. In *Betterley* v. *Stainsby*, Law Rep. 2 C. P. 570, WILLES, J., says: "It was also decided in *Maples* v. *Pepper*, 18 C. B. 177, that a contingency that a bankrupt should break his contract is not such a contingency as is meant by the act."

For the same reason it ought not to be in the power of the party having the indemnity to pay the outstanding claims before the final dividend, so as to prove his claim and share in the assets, or, by delaying to pay the creditors until after the final dividend, hold his claim over the bankrupt for future collection. Such an election might give him a dangerous power over the proceedings. It would seem, therefore, that there is even less foundation for proving this claim under § 5068, the contingent clause, than under § 5070, the surety clause. And there are some serious practical difficulties against proving under either. For how much amount shall he prove? The bond of indemnity in this particular case, it should be noted, was not confined to any particular specified debt, the amount of which was known, or could be readily ascertained, but for "all the debts and liabilities" of the late firm, the amounts and names of creditors being left entirely uncertain. How could Fisher know how much was due from Tifft? He had left the firm ten years before. How could he know how much, if anything, he would be called upon to pay before the final dividend? How much would he be able to pay before that day? Could he prove for *the whole penalty of the bond*, and share in the dividends on the whole amount, irrespective of the amount he should be called upon to pay before distribution, or shall his percentage be computed only on the amount so paid? And if he proved for the whole bond, and took a dividend only on what he paid before distribution, but should pay another claim after that event, could he divide the bankrupt's indemnity bond and recover for the latter, but not the former?

Another test is this: the Bankrupt Act before quoted, as to contingent claims, provides that if a claim is provable, its present value may be ascertained and liquidated, and the creditor allowed to prove for that amount, implying that such claims only could be proved as could be thus valued. But how could the value of Fisher's indemnity against Tifft in

this case be valued? The whole amount of the claims for which he was liable was unknown; there was no certain, reliable mode of ascertaining them. Fisher would not know; Tifft might not know; there is no way to compel creditors to come forward and disclose their claims against Tifft & Co. And if these were all known, it might be impossible to determine how much Fisher would ever really pay on them, and so how much would be the "present value" of his bond of indemnity? Theoretically and practically, therefore, the question of proof in such cases is certainly not free from embarrassment.

EDMUND H. BENNETT.

Supreme Court of New Jersey.

STATE, JAMES ROCHE, PROSECUTOR, v. THE MAYOR, &c., OF JERSEY CITY.

Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not, in terms, repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the earlier act. The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete seheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory.

The rule in this case applied to the ordinances of a municipal corporation.

THIS was a certiorari to a police justice to bring up the record of a conviction of James Roche, under an ordinance of Jersey City, for selling liquor on Sunday. The facts are sufficiently stated in the opinion.

C. H. Winfield, for the plaintiff.

H. Traphagen and *Gilbert Collins*, for the defendants.

The opinion of the court was delivered by

VAN SYCKEL, J.—James Roche, the prosecutor, was convicted before a police justice for violating the ninth section of an ordinance of Jersey City, passed July 8th 1862, which prohibits the sale of intoxicating liquors on Sunday.

The question presented by this case is, whether the ninth, tenth